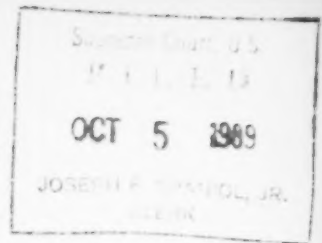


89-925



No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
DECEMBER TERM, 1989  
\_\_\_\_\_

JOHN S. TOVREA,

Petitioner

v.

RAILROAD RETIREMENT BOARD  
NATIONAL RAILROAD ADJUSTMENT BOARD

Respondents.

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI, PRO SE,  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT, NO. 88-2808  
\_\_\_\_\_

JOHN SO. TOVREA  
296 So. Ogden St.  
Denver, CO 80209  
(303) 733-1652

84-52



### QUESTIONS PRESENTED

A. Does the Retirement Board, the Adjustment Board and Petitioner's railroad employer have the authority to subject Petitioner to mandatory retirement at age 56! Without a resignation?

B. Does the attorney for the Retirement Board and the Adjustment Board have the authority to make agreements with Petitioner's attorney that would prevent Petitioner from making future appeals, and not informing Petitioner, resulting in reduced annuity?

### DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the



Tenth Circuit were Petitioner John S. Tovrea and the Respondents Railroad Retirement Board and the National Railroad Adjustment Board. The foregoing named parties are the same parties as were before the court of original jurisdiction, the United States District Court for the Tenth Circuit.



TABLE OF CONTENTS

TABLE OF CONTENTS--RULINGS  
AND CORRESPONDENCE

	PAGE
QUESTIONS PRESENTED.....	i
DESIGNATIONS OF PARTIES.....	i
TABLE OF CONTENTS.....	iii
OPINION BELOW.....	1
CONSTITUTIONAL PROVISION INVOLVED...	1
STATUTES.....	2
REGULATIONS.....	2
STATEMENT OF FACTS.....	2
REASONS FOR GRANTING THE WRIT.....	3
CONCLUSION.....	4
APPENDIX.....	7
PETITIONS AND LETTERS REGARDING A REHEARING.....	7
ORDER AND JUDGMENTS REGARDING THE HEARING - BEGINNING ON PAGE.....	10
NATIONAL RAILROAD ADJUSTMENT BOARD - FIRST DIVISION DECISION...	24





## TABLE OF CONTENTS

	PAGE
REINSTATEMENT DENIED BY RAILROAD....	27
HEALTH, EDUCATION AND WELFARE DECISION.....	28
SOCIAL SECURITY ADMINISTRATION DECISION, BUREAU OF HEARINGS AND APPEALS.....	44
DECISION OF APPEALS CIRCUIT AFFIRMING SOCIAL SECURITY DECISION ON DISABILITY, AND SOCIAL SECURITY COMPENSATION.....	52
LETTERS AND DATES U.S. DEPARTMENT OF LABOR, JUNE 16, 1980.....	55
EMPLOYMENT STANDARDS ADMIN- ISTRATION, JULY 7, 1981.....	57
OFFICES OF FEDERAL CONTRACT COMPLIANCE PROGRAM, OCTOBER 13, 1982.....	59
DECISION OF U.S. DEPARTMENT OF LABOR THAT RAILROAD VIOLATED ITS OBLIGATION UNDER SECTION 503 OF THE REHABILITATION ACT OF 1973 AS AMENDED.....	61
P.I. REPORT, 1975.....	67



TABLE OF CONTENTS

	PAGE
NOTARIZED AFFIDAVIT OF PETITIONER...	77
CERTIFICATE OF SERVICE (NOTARIZED)..	78



OPINION BELOW

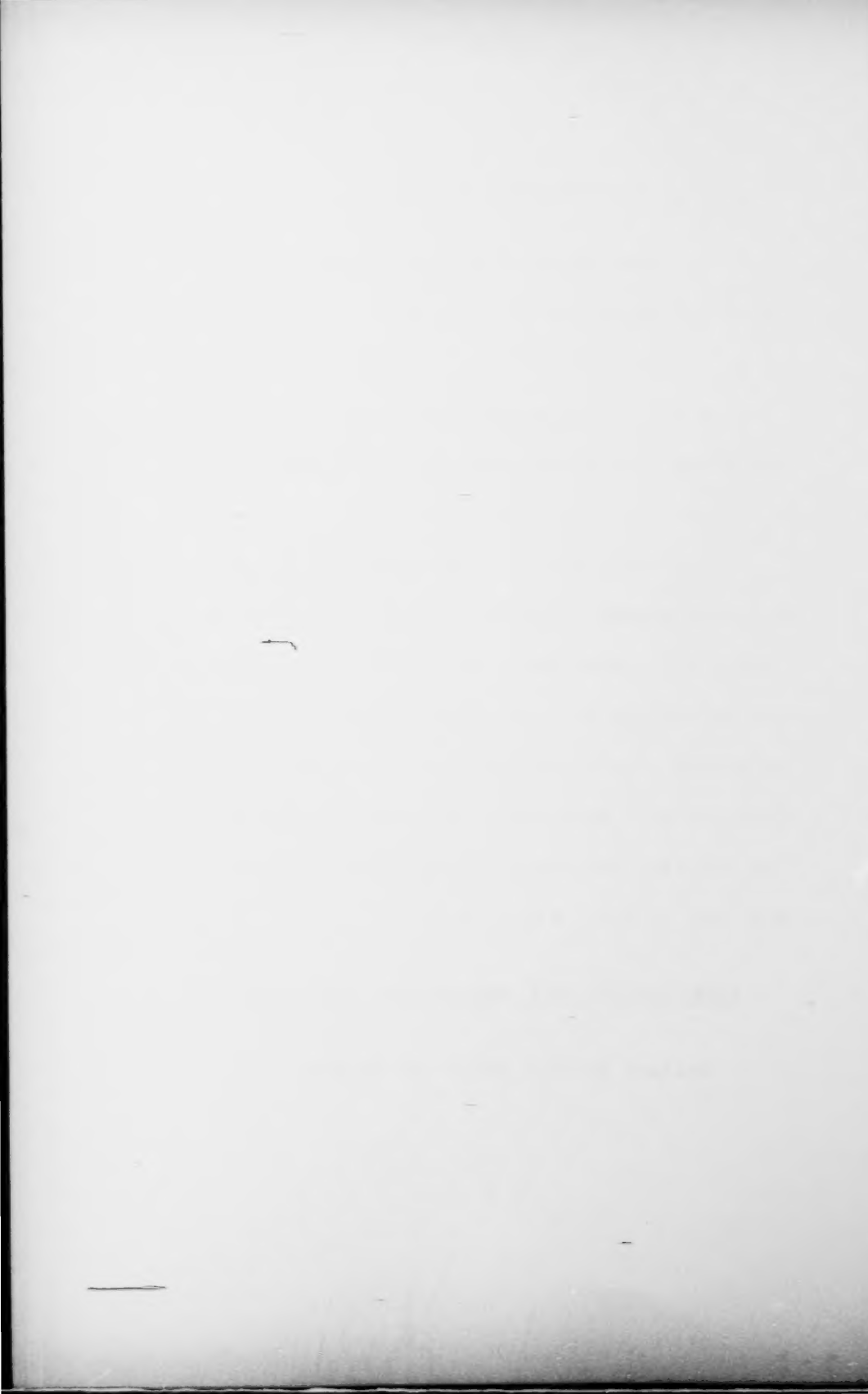
I. The memorandum opinion of the Court of Appeals is attached as Exhibit A.

A.II. Jurisdiction: Petitioner's petition for REHEARING No. 88-2808, August 9, 1989.

The opinion of the Court of Appeals for the Tenth Circuit was filed July 12, 1989, and confirmed August 9, 1989. The jurisdiction of this court is invoked pursuant to Title 45, United States Code, Chapter 8 - Sections 151-188, Section 5 (F) of the Railroad Unemployment Insurance Act [45 U.S.C. #355 (F)].

CONSTITUTIONAL PROVISION INVOLVED

United States Bill of Rights



## STATUTES

Title 45 - U.S.C. Chapter 8, Sections  
151-188

U.S. Railroad Retirement Act 1974 (45  
U.S.C. Section 23) (a)

Rehabilitation Act 1973 (Section 503)  
45 U.S.C. of 153 (Q)

## REGULATIONS

Railway Labor Act

## STATEMENT OF FACTS

Petitioner's Birthday - November  
20, 1922

Employed - Rio Grande Railroad,  
October, 1950

On duty injury - May 1975

Enforced retirement 1977 - made  
retroactive to 1975

Petitioner applied for reinstatement August, 1979, and required to





submit to 9 medical examinations by seven doctors, taking a period of three months.

Eight exams were favorable, one unfavorable.

Petitioner was denied reinstatement, resulting in reduced annuity, and losing credit for service months. Social Security Administrative Law Judge's decision

#### REASONS FOR GRANTING THE WRIT

To enable Petitioner to coordinate all the information from the Retirement Board, the Adjustment Board, and former Railroad Employer's as to the length and time of employment, the time lost due to "on duty injuries". To assemble all the information and to present this information to the Adjustment Board for a



ruling! To obtain service Months due him for on duty injuries!

This case provides the court with an opportunity to define the restrictions and limits that government agencies can impose on an individual regarding enforced retirement.

#### CONCLUSION

Petitioner respectfully requests that the Court would reverse the decision by the U.S. Court of Appeals for the Tenth Circuit (No. 88-2808) and grant Petitioner the rights granted by the National Railway Labor Act! Service Months from July, 1975, to August, 1979, in accordance with Social Security determination EX D - while Petitioner was considered totally disabled, to



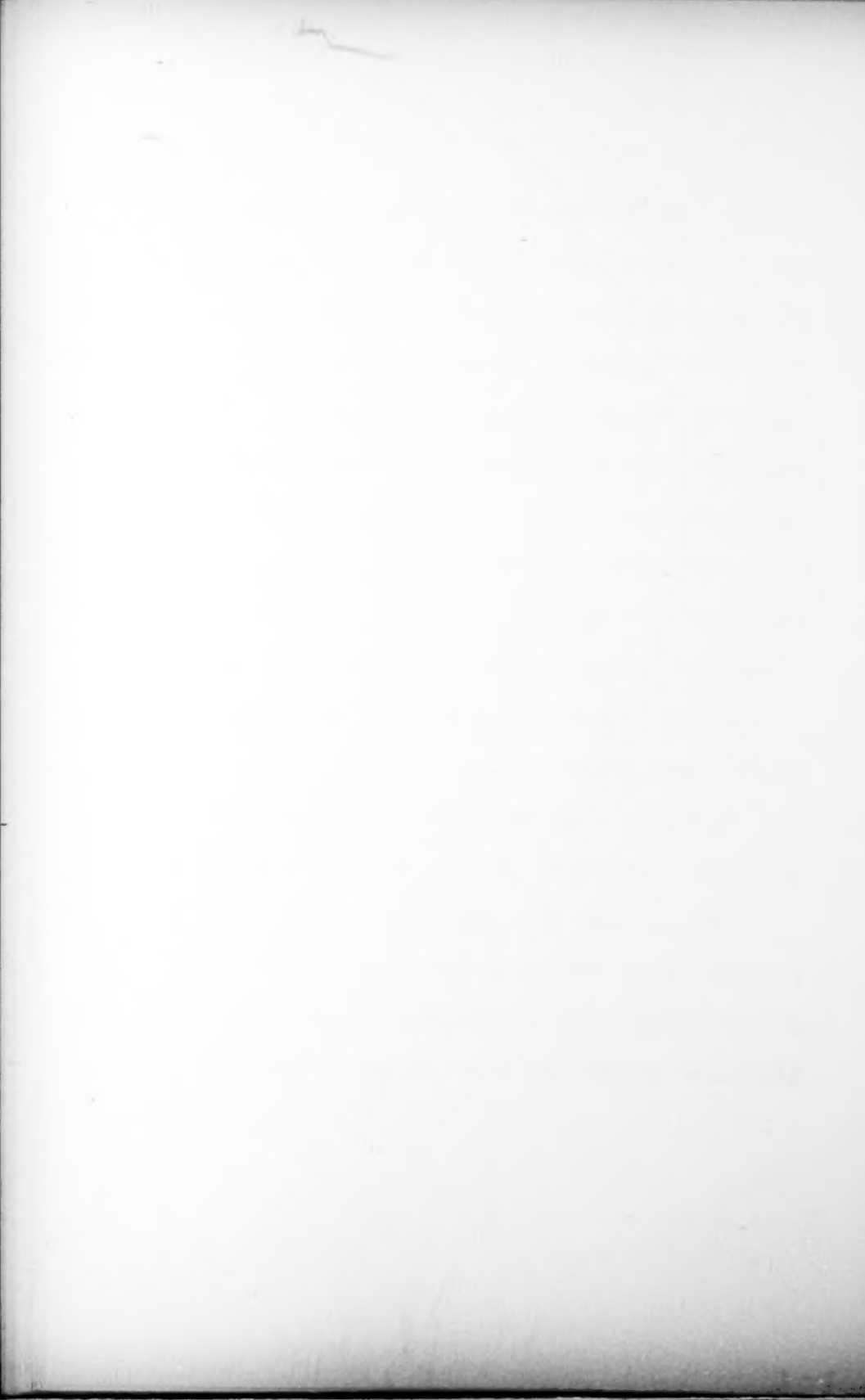
August, 1979, when Petitioner made application for reinstatement with the carrier, and was denied on medical grounds.

The carrier D.&R.G.W. Railroad, required Petitioner to submit to 9 Examinations by 7 doctors and only one was negative.

The railroad did not report Petitioner's on-duty injuries to the Boards as required by law, resulting in incomplete records and reduced service months and annuity.

N.R.A.B. 1st Division Award (23759)  
(Claims dismissed) Docket 43416.

The reason the appeal was not presented in the usual manner: The General Chairman of the U.T.U. decided that the length of time involved for the



Physical Exams, required by the Courts,  
exceeded the time limit for an appeal as  
required by Section 153 First (1).

Plaintiff did comply with Article  
31(b) of the agreement.





## APPENDIX

L



FILED  
United States Court of Appeals  
Tenth Circuit

AUG 9 1989

ROBERT L. HOECKER  
Clerk

No. 88-2808

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

JOHN S. TOVREA,  
Petitioner,

v.

RAILROAD RETIREMENT BOARD, NATIONAL  
RAILROAD ADJUSTMENT BOARD



Respondents

---

ORDER

---

This matter comes on for consideration of petitioner's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

---

ROBERT L. HOECKER, CLERK



RECEIVED JUL 13 1989

FILED  
United States Court of Appeals  
Tenth Circuit

JUL 12 1989

ROBERT L. HOECKER  
Clerk

No. 88-2808  
D.C. No. 0090-0  
(Railroad Retirement Board)

JOHN S. TOVREA,

Petitioner,

v.

RAILROAD RETIREMENT BOARD;  
NATIONAL RAILROAD ADJUSTMENT BOARD,

Respondents.

---





ORDER AND JUDGMENT\*

---

Before LOGAN, SEYMOUR, and BALDOCK,  
Circuit Judges.

---

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

---

\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for the purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.



Petitioner petitions for review of the Railroad Retirement Board's calculation of his retirement annuity. The Board entered its final decision on June 4, 1987, and the decision was communicated to petitioner on June 6. A claimant may petition for judicial review of a final decision of the Board within one year of the date the final decision was entered on the Board's records and communicated to the claimant. 45 U.S.C. S 231g.

On December 11, 1987, petitioner filed with this court a timely petition for review of the Board's decision. The parties then reached an agreement to settle the dispute and dismiss the appeal. Pursuant to the agreement, the Board agreed to recalculate the retirement annuity, crediting petitioner for additional service and compensation



accruing in 1972. The parties further agreed petitioner could assert another administrative claim for additional service and compensation accruing in 1976 if such a claim was appropriate in light of the resolution of an action then pending in state court. Petitioner specifically agreed to dismiss any other claims arising from the Board's June 1987 decision.

Petitioner filed with this court a second petition for review of the Board's June 1987 decision on December 11, 1988. The Board filed a motion to dismiss this appeal for lack of jurisdiction.

Because the settlement agreement precludes review, the petition for review is DISMISSED. See, e.g., United States v. Parkhill, 775 F.2d 612, 616

State v. Tamm 1911 100 N.W. 215

Review of Tamm's conviction for murder

Grand jury returned indictment for murder

Verdict of guilty of murder in the first degree

Sentence of death pronounced

Appeal to the Supreme Court

Reversed the conviction and remanded the case

for a new trial

on the ground that the jury was improperly

instructed as to the law

and the evidence was insufficient

to sustain the conviction

and the jury was improperly

instructed as to the law

and the evidence was insufficient

to sustain the conviction

and the jury was improperly

instructed as to the law

(5th Cir. 1985) (party who enters into valid and binding settlement of litigation is precluded from seeking further or contradictory relief).

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephanie K. Seymour  
Circuit Judge





RECEIVED  
United States Court of Appeal  
Tenth Circuit

JAN 19 1989

ROBERT L. HOECKER  
Clerk

No. 88-2808

John S. Tovrea,

Petitioner,

v.

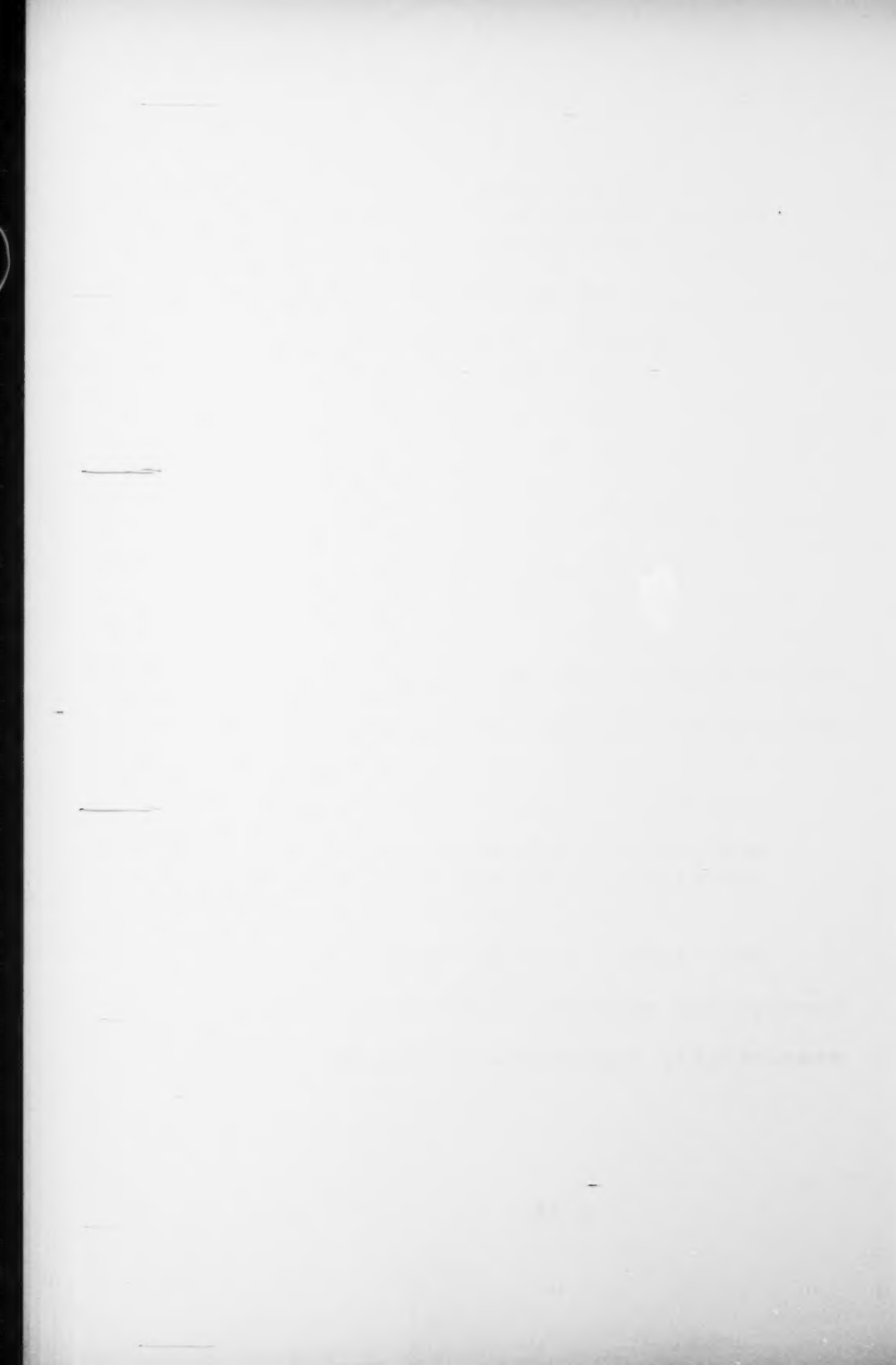
Railroad Retirement Board and

National Railroad Adjustment Board,

Respondents

PETITIONER'S MEMORANDUM IN  
OPPOSITION OF MOTION TO DISMISS

Petitioner, John S. Tovrea, by and  
through his attorney, Francis K. Culkin,  
respectfully represents as follows:



1. The Railroad Retirement Board is an independent agency in the executive branch of the United States Government which administers the Railroad Retirement Act (45 U.S.C. §§ 231-231v) and the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351-368).

2. The National Railroad Adjustment Board is established by section 3 of the Railway Labor Act as amended (45 U.S.C. § 153) to hear disputes arising out of grievances or interpretation or application of agreements concerning rates of pay, rules or working conditions in the railroad industry.

3. On June 4, 1987, the three members of the Railroad Retirement Board issued a final decision regarding Mr. John S. Tovrea's claim for benefits under the Railroad Retirement Act (properly



designated Board Order 87-84), which was communicated to Mr. Tovrea on June 6, 1987 (exhibit A).

4. Section 8 of the Railroad Retirement Act (45 U.S.C. § 231g) allows a claimant to petition for review of a final decision of the Board within one year from the date that decision is communicated to him.

5. On December 11, 1987, Mr. Tovrea, through his attorney, Francis K. Culkin, petitioned this Court under Section 8 to review Board Order 87-84 in regard to the amount of his annuity under the Railroad Retirement Act. This filing told the statute of limitations.

6. On May 6, 1983, the parties filed a joint Motion to Dismiss on the condition that the Board would recalculate Tovrea's annuity to allow additional railroad



service and compensation to be credited for 1972.

7. Subsequently, it has come to Tovrea's attention that there were other miscalculations of his annuity. The intent of the Railroad Retirement Act (45 U.S.C. §§ 231-231v) is to provide for a just calculation of the railroad employees annuity. Granting the Respondent's Motion to Dismiss would have the effect of denying the Petitioner the right to the full annuity earned by him during his service in the railroad.

#### CONCLUSION

Petitioner, John S. Tovrea submits that the Respondent's, Railroad Retirement Board's, Motion to Dismiss should be

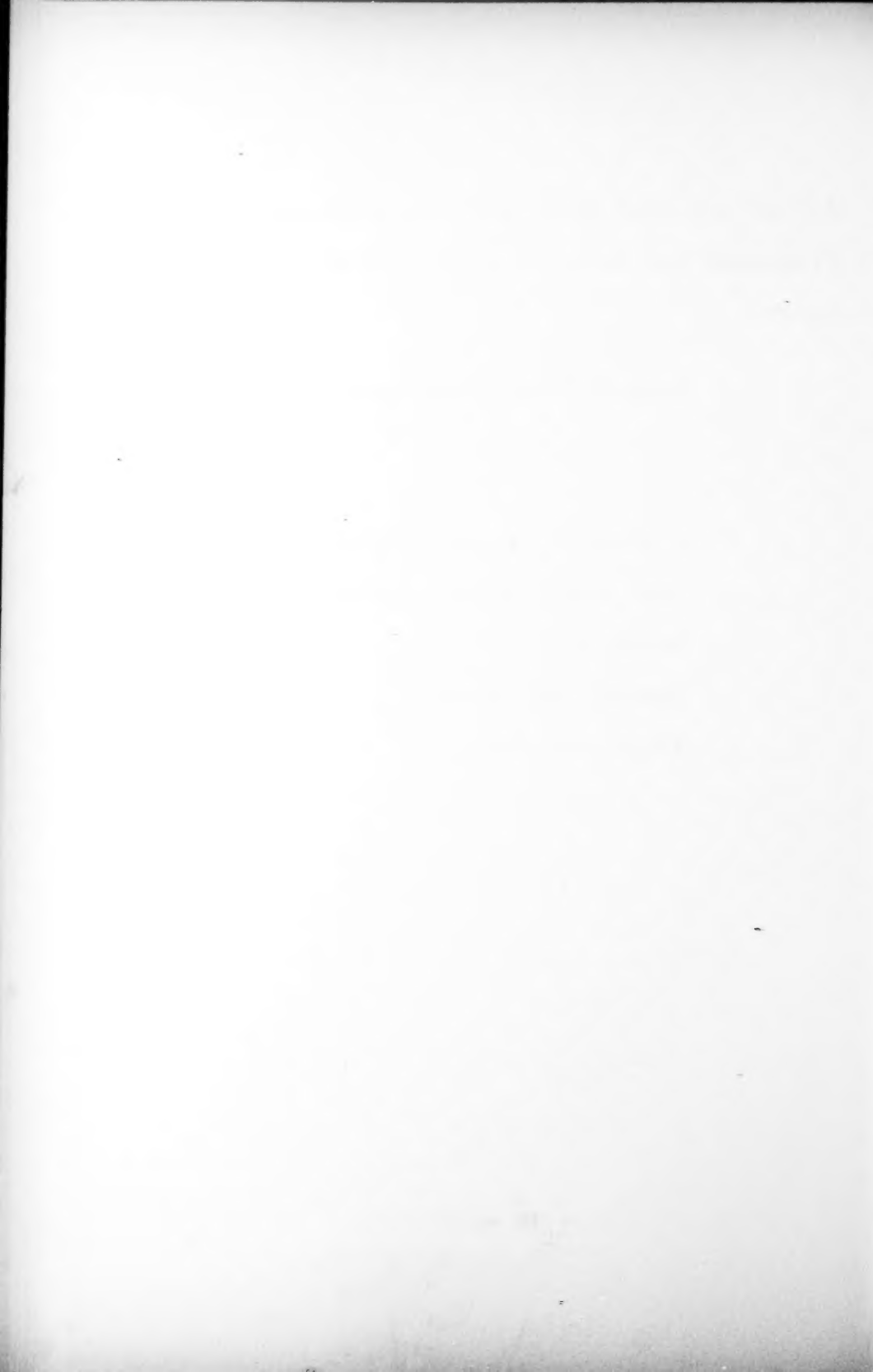




denied and that this matter should not be  
dismissed for lack of jurisdiction or as  
moved.

Respectfully submitted,

Francis K. Culkin, #2969  
1660 South Albion Street  
Suite 918  
Denver, CO 80222  
(303) 759-3495



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE 10TH CIRCUIT COURT

NO. 88-280  
(D.C. NO. 0090-0)  
(RAILROAD RETIREMENT BOARD)

PETITION FOR RECONSIDERATION

JOHN S. TOVREA,

Petitioner

v.

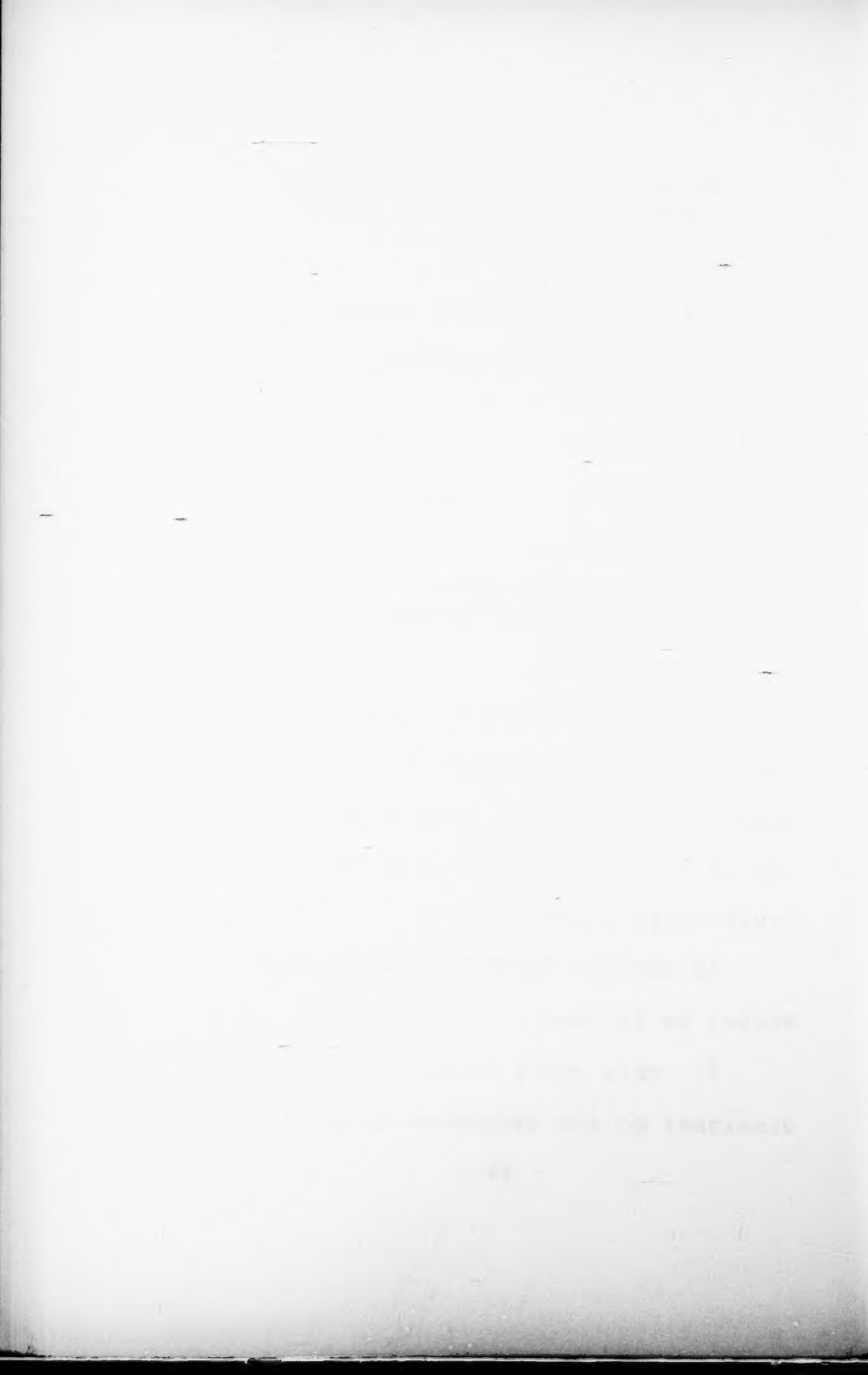
NATIONAL RETIREMENT BOARD;  
NATIONAL RAILROAD ADJUSTMENT BOARD

Respondent

COMES NOW Petitioner through counsel  
and respectfully requests this Honorable  
court reconsider its Order and Judgment  
issued on July 12, 1989 dismissing  
Petitioners appeal.

AS GROUNDS THEREFORE Petitioner  
states as follows:

1. This court based its Order of  
dismissal on the agreement between the



parties concerning parts of Board Order 87-84 reached on May 6, 1988. This court found that the Order barred further disputes regarding Petitioners annuity.

2. The Railroad Retirement Act (45 U.S.C. Section 231-231V) and the National Railroad Adjustment Board (45 U.S.C. 153) are federal laws that regulate relationships between railroad lines and railroad workers.

3. The statutes are remedial in nature and are to be liberally construed.

4. The statutes are complex. Often, as was the case below, the railroad worker appears pro se before the Administrative Agency. In general, as is again the case here, the Administrative Agency's decision covers a worker's lengthy career. Often the decision covers a career in which the worker was employed by several railroads.



Such cases despite due diligence by all parties are prone to produce new questions.

5. The agencies involved in this matter were created by Congress to insure that railroad workers are paid appropriate annuities, and disputes between worker's and carriers are resolved fairly.

6. The imbalance between the agency's economic strength and that of the railroad employee's is great.

7. The effect of a court order barring further analysis of a agency decision is substantially greater on the worker than on the agency.

8. It would be consistent with the Congressional policy 45 U.S.C. Section 231-231V. and 45 U.S.C. 153 for this court to issue an Order stating that it continues to have jurisdiction over



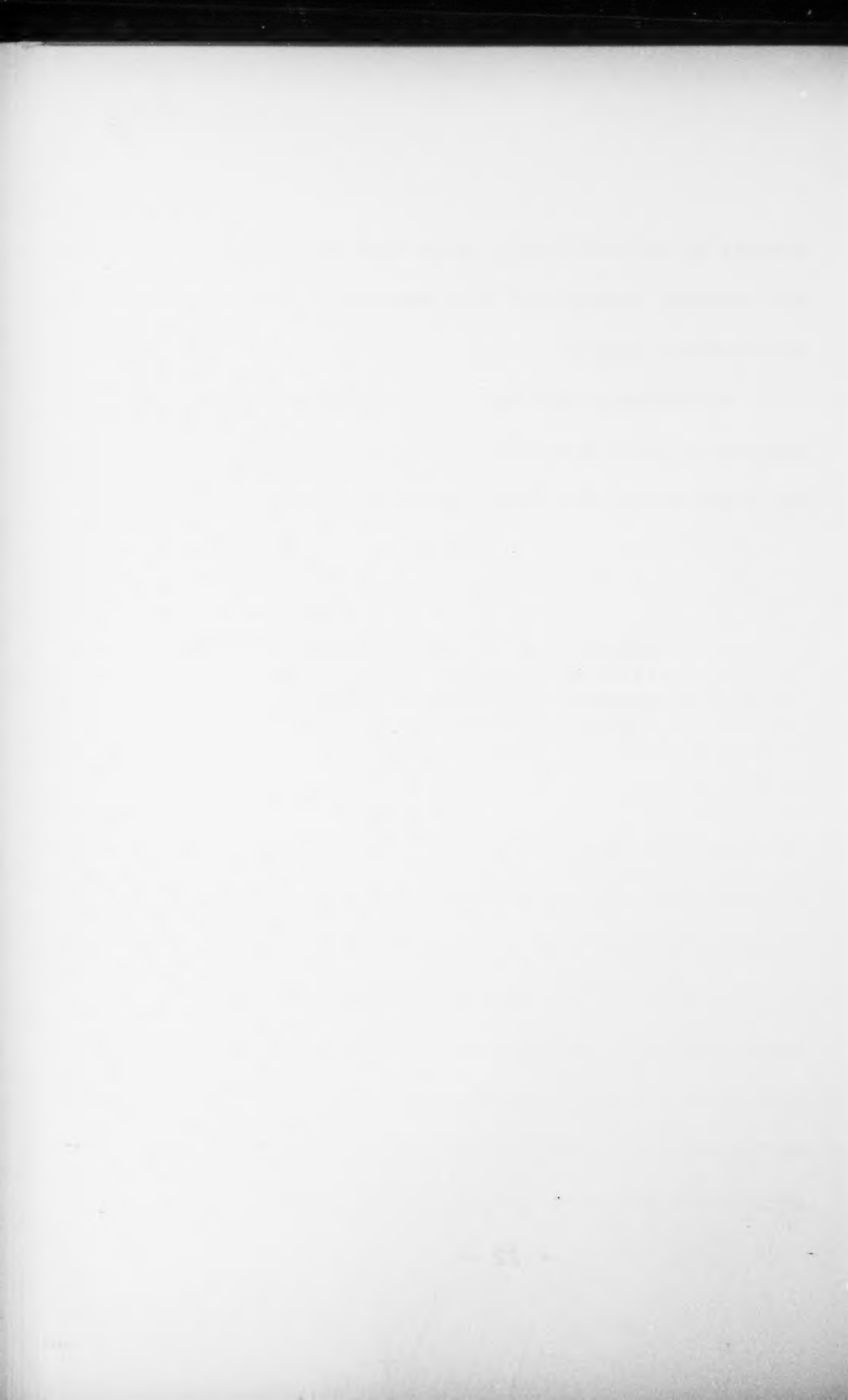


Tovrea's relationship with the Railroad Retirement Board and the National Railroad Adjustment Board.

WHEREFORE the Petitioner respectfully requests this Honorable court to GRANT this Petition for Reconsideration.

---

Francis K. Culkin #2969  
1660 S. Albion, Suite 918  
Denver, Colorado 80222  
(303) 759-3495



CERTIFICATE OF MAILING

I hereby certify that on this 25  
day of July, 1989, that I have  
placed a true and correct copy of the  
foregoing PETITION TO RECONSIDER, in the  
U.S. Mail, proper postage prepaid,  
addressed to the following:

Mr. Karl T. Blank  
Mr. Edward S. Hintzke  
Mr. Stephen Bartholow  
Railroad Retirement Board  
844 North Rush  
Chicago, Ill. 60611



NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

With Referee Preston J. Moore

Award 23759

Docket 43416

PARTIES	{	John S. Tovrea
TO		
DISPUTE		Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM

"1. This case has been referred to the offices of the EEOC on an age discrimination basis in 1979. The EEOC's representative arranged a consultation meeting with the Railroad's legal representative who refused Plaintiff reinstatement on medical grounds.

"2. The director of EEOC referred the case to the F. C. C. and the final determination was not made until March 20, 1984.

30, 1984

"3. Plaintiff now petitions the Court to resolve this issue by reinstating Plaintiff as switchman with the Denver and Rio Grande Western Railroad with full seniority to October 24, 1950 and all rights and back pay from August, 1975 to reinstatement date."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

This Division has carefully reviewed the record before it in this instance. That record clearly reveals that the claim was not handled in the usual manner, as required by Section 153, First (i), of the





Railway Labor Act, as amended. Moreover, the facts further evidence that no conference was held prior to the Claimant submitting his claim to this Board.

Accordingly, we are left no alternative but to dismiss the claim. See First Division Award Nos. 21875, 14425, 15417, 21965, 22097, and 23120.

Furthermore, it appears to be uncontested that Article 31 (b) of the Agreement was not complied with in this case and for that reason also the claim will be dismissed.

AWARD: Claim dismissed.

DATED AT CHICAGO, ILLINOIS

THIS 13th DAY OF JUNE, 1985

NATIONAL RAILROAD ADJUSTMENT BOARD  
BY ORDER OF FIRST DIVISION

ATTEST:

---

Nancy J. Dever - Executive Secretary

ATTEST:

\_\_\_\_\_  
NANCY J. DAVIS - Secy.

Director of Personnel

RECEIVED

NOV - 8 1979

D.&R.G.W.R.R Co.

DENVER, COLO.

November 4, 1979

Mr. J.S. Tovrea  
296 South Ogden  
Denver, Colorado 80209

Dear Sir:

As result of the findings in your examinations by the doctors for the Railroad Company, your request to return to service as Switchman with The Denver and Rio Grande Western Railroad Company is denied.

Yours truly,

L.R. Parsons  
Superintendent

bcc: D. W. Pope  
M. K. Taylor  
J. W. Lovett



DEPARTMENT OF  
HEALTH, EDUCATION AND WELFARE  
SOCIAL SECURITY ADMINISTRATION  
BUREAU OF HEARINGS AND APPEALS  
DECISION

In the case of

John S. Tovrea  
(Claimant)

(Wage Earner) (Leave blank if same as  
above)

Claim for

Period of Disability and  
Disability Insurance Benefits

522-14-4328  
(Social Security Number)

This case is before the administrative law  
judge on a request for hearing filed by  
the claimant.



## ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a disability, as defined in the Act, and if so, when such disability commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

## LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 of the Act provides for the payment of disability





insurance benefits where the requirements specified therein are met.

Section 223(d) (1) (A) of the Social Security Act, as amended, defines "disability" as the: "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or . . . ."

Section 223(d) (2) (A) more definitively delineates:

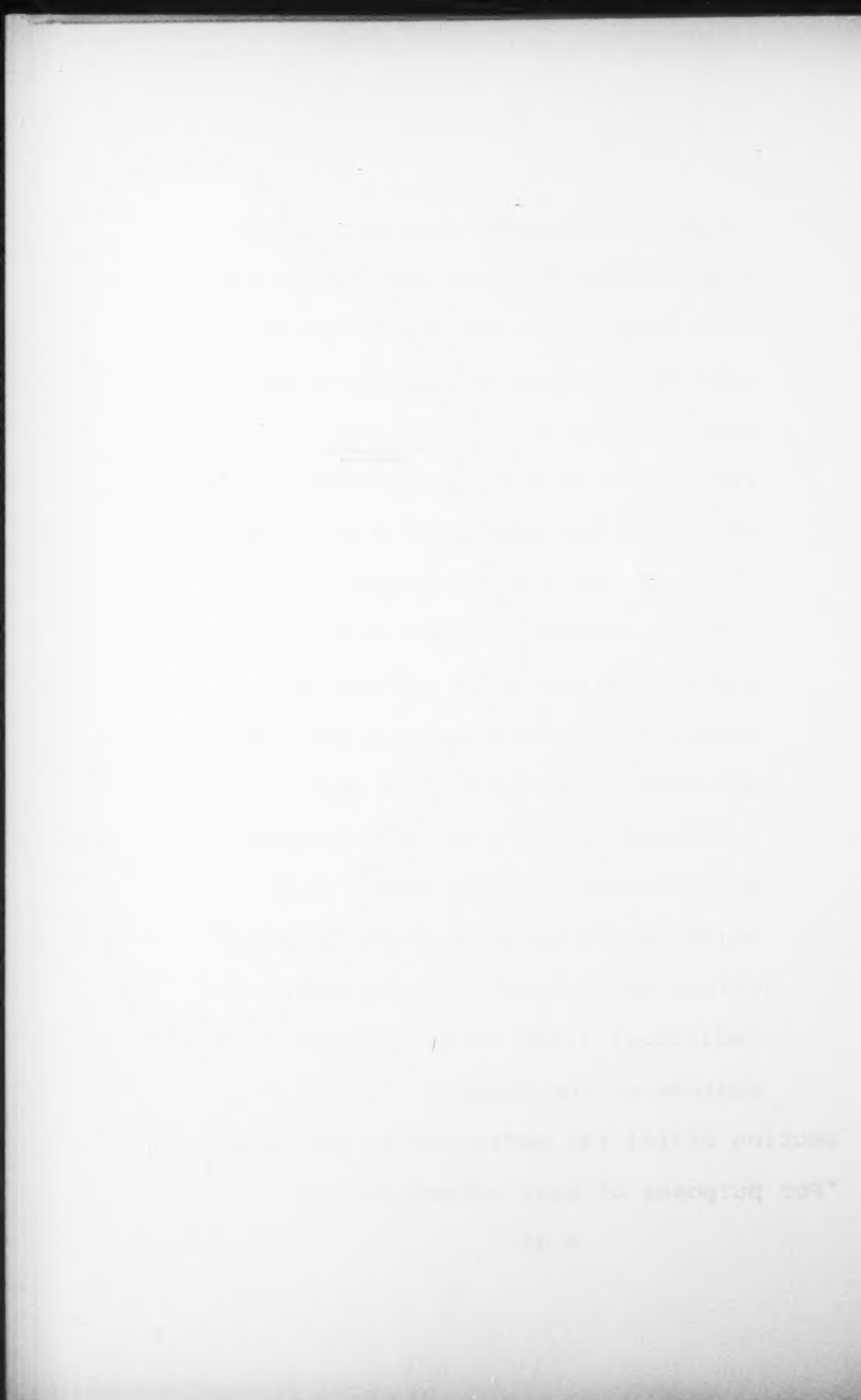
An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable



to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Section 223(d) (3) additionally explains:

"For purposes of this subsection, a



'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 404.1532(b) of Social Security Regulations No. 4 states, in part:

Substantial gainful activity refers to work activity that is both substantial and gainful. Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, productive in nature. Gainful work activity is activity for remuneration or profit (or intended for profit, whether or not a profit is realized) to the individual



performing it or to the persons, if any, for whom it is performed, or of a nature generally performed for remuneration or profit. . . .

Section 404.1539 of Social Security Regulations No. 4 states, in part:

Where it has been determined that an individual is under a disability as defined in Section 404.1501, the 'disability' shall be found to have ceased:

- (a) In the case of an individual entitled to disability insurance benefits . . . based on disability, in the earlier of the following:
  - (1) The month in which the impairment, as established by the medical or other





evidence, is no longer  
of such severity as to  
prevent him from  
engaging in any  
substantial gainful  
activity or. . . .

#### EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, the arguments made, and the exhibits described in the list of exhibits attached to this decision.

#### EVALUATION OF THE EVIDENCE

The claimant filed an application on July 22, 1975, alleging that he became disabled on July 21, 1975, due to arthritis, depression and anxiety.

The claimant was born November 30, 1922, completed 12 years of schooling, and has

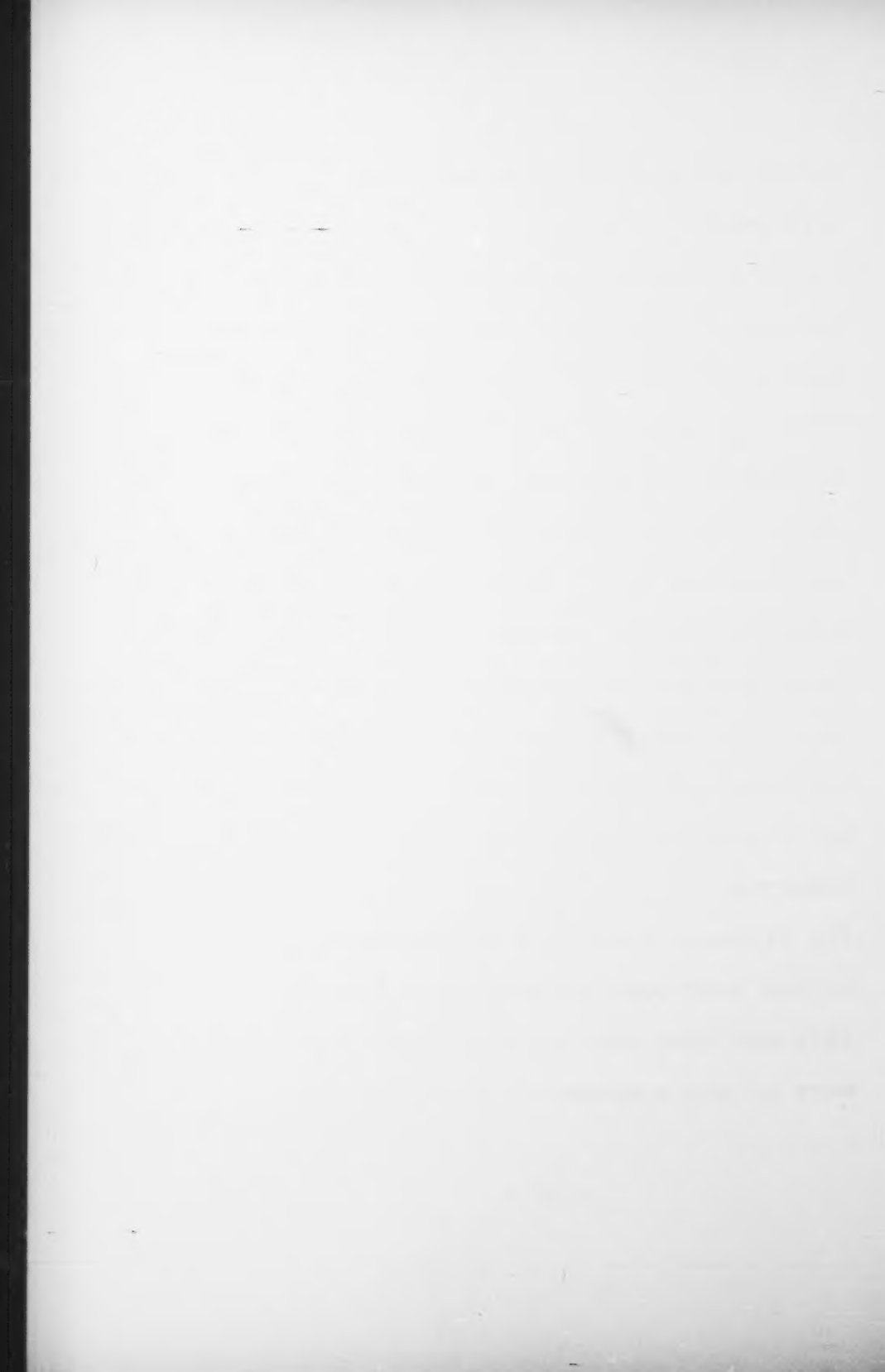


worked principally as a railroad switchman.

I find claimant was disabled within the meaning of the Social Security Act for the period July 21, 1975, through January 31, 1979. It appears that claimant was injured while working, which aggravated the arthritis in his right arm and leg, and also the prior back problem which had bothered him for several years.

Subsequently, the claimant developed tinnitus, hearing loss, intermittent vertigo, and right otalgia. Claimant also had a perforation of the right tympanic membrane.

The claimant testified at the hearing that he had undergone surgery in January of 1979 and that this surgery had alleviated many of his symptoms of tinnitus and



vertigo. Consequently, the finding that claimant's disability ended January 31, 1979.

Although claimant continues to complain of pain in his neck and depression and anxiety, there is little in the way of objective medical evidence to support these allegations. According to the record, the last time claimant saw a physician for neck pain was March 23, 1977 (Exhibit 26). At that time a cervical collar and isometric neck exercises were prescribed. The claimant was also scheduled for a psychological examination in 1977; however, the claimant failed to keep an arranged appointment. Therefore, it must be concluded that claimant's depression and anxiety, and neck problems are not as severe as alleged. The administrative law judge finds therefore,



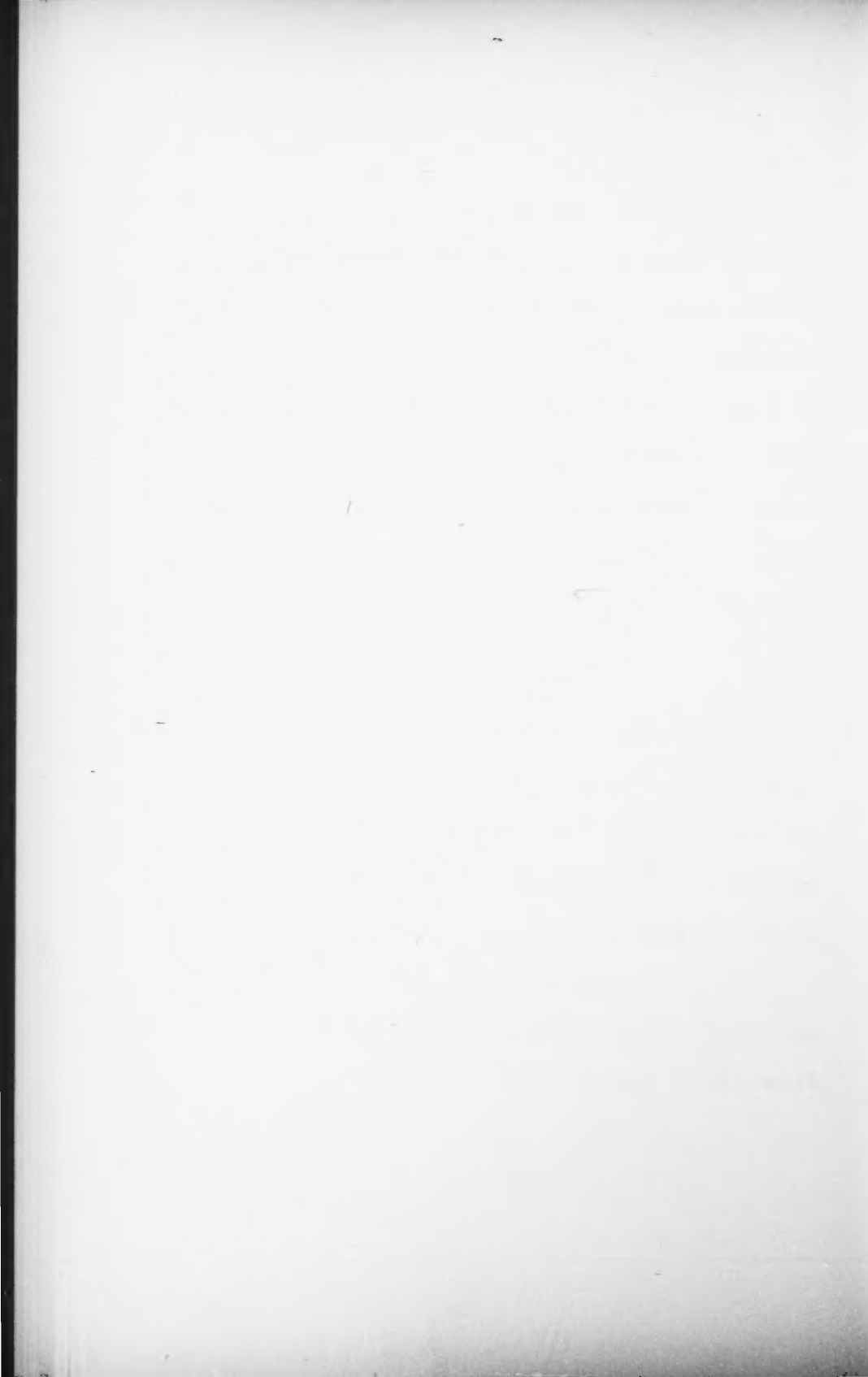
that beginning February 1, 1979, claimant had the capacity to return to any of his former work activity as a railroad switchman.

In view of the foregoing, the administrative law judge finds that claimant was disabled within the meaning of the Social Security Act for the period July 21, 1975, through January 31, 1979.

#### FINDINGS OF FACT

The administrative law judge has carefully considered the entire record in this case, and based upon the greater weight of the credible evidence, makes the following specific findings:

1. The claimant met the statutory earnings requirements on the alleged disability onset date.





2. The claimant has a high school educational level.

3. The claimant was born November 30, 1922, and is now approximately 57 years of age.

4. Claimant's impairments prevented him from engaging in any substantial gainful activity for the period July 21, 1975, through January 31, 1979.

5. Commencing February 1, 1979, the claimant's impairments had improved to the point where he was able to return to any of his former work activity as a railroad switchman.

6. The claimant was disabled within the meaning of the Social Security Act for the period July 21, 1975, through January 31, 1979.



DECISION

It is the decision of the administrative law judge that, based upon the application filed July 22, 1975, the claimant is entitled to a period of disability commencing July 21, 1975, and to disability insurance benefits; and based upon the finding that claimant's disability ceased January 31, 1979, the claimant's entitlement to a period of disability ended with the close of March 1979, the second month following the month in which his disability ceased.

---

ADAM GEFREH  
Administrative Law Judge

Date: September 5, 1979



John S. Tovrea  
(Claimant/Applicant)

522-14-4328  
(Social Security Number)

(Wage Earner) (Leave blank in Title XVI  
Cases or if name is same as above)

<u>EXHIBIT</u> <u>NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF</u> <u>PAGES</u>
1	Certification of Service and Compensation, for period 1937 to 1974	1
2	Disability Decision Sheet, Dated December 3, 1975	1
3	Disability Determination, dated March 15, 1976	1
4	Notice of Disapproved Claim, dated March 25, 1976	2
5	Request for Reconsidera- tion, filed July 13, 1976, with attached envelope	3



<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
6	Decision of the Appeals Referee, dated April 25, 1977	7
7	Bureau of Disability Insur- ance Memorandum, dated September 2, 1977, regarding Procedures in Processing Claim	2
8	Documentation for File, dated August 12, 1977, regarding Claimant's Appeal to the Railroad Board (and Reconsideration Request filed with SSA)	1
9	Documentation for File, dated January 10, 1978, regarding Status of Recon- sideration (and Initial RRB Appeal)	1





<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
10	Bureau of Disability Insurance Memorandum, dated January 24, 1978, Trans- ferring Claim to Denver District Office for Action	2
11	Memorandum, Railroad Retire- ment Board, dated February 8, 1978, regarding Contact with Claimant (and Claimant's Subsequent Move to Tucson, Arizona)	1
12	Disability Determination on March 15, 1976	2
13	Bureau of Disability Insurance Memorandum, dated May 16, 1978, regarding Development of Case	2
14	Report of Contact, dated November 16, 1978	2



<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
15	Disability Determination, dated January 12, 1979	1
16	Disability Determination, dated January 12, 1979	1

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Form HA-540-U8 (12-78)  
(Formerly HA-540)

CLAIM FILE



DEPARTMENT OF  
HEALTH, EDUCATION, AND WELFARE  
SOCIAL SECURITY ADMINISTRATION  
BUREAU OF HEARINGS AND APPEALS  
DECISION OF APPEALS COUNCIL

In the case of

John S. Tovrea  
(Claimant)

(Wage Earner) (Leave blank if same as  
above)

Claim for

Period of Disability and  
Disability Insurance Benefits

522-14-4328

(Social Security Number)

On November 27, 1979, the claimant and his  
representative were advised by letter that  
the Appeals Council decided to reopen the  
hearing decision dated September 5, 1979,



and were advised of their rights with respect thereto.

The administrative law judge held that the claimant was disabled as defined in title II of the Social Security Act as of July 21, 1975, and that such disability had ceased as of January 31, 1979. The administrative law judge further held that he was entitled to disability insurance benefits based on an application filed on July 22, 1975, with the Railroad Retirement Board since such is also an application to establish a period of disability under the provisions of the Social Security Act.

The Appeals Council adopts the administrative law judge's statements as to the pertinent provisions of the Social Security Act, the issues in the case, and his conclusion with regard to the issue





of disability. The Appeals Council does not adopt the conclusions of the administrative law judge on the issue of entitlement to disability insurance benefits.

Regulation 404.120(d) states that for the purpose of meeting the disability insured status requirements for the establishment of a period of disability only, quarters of coverage may be granted for "(a) Compensation for service after 1936 covered by the Railroad Retirement Act... even though such compensation may not be used for other purposes of Title II of the Social Security Act because the individual has 120 or more months of such service, or is receiving an annuity under the Railroad Retirement Act."

The Appeals Council has considered the record which was before the administrative



law judge and the additional evidence which has been admitted into the record as follows:

Exhibit AC-1 Memorandum from the Office of Disability Operations dated October 22, 1979. -

Exhibit AC-2 Letter from the Appeals Council to the claimant's representative dated February 21, 1980.

Exhibit AC-3 Letter from Dennis E. Valentine, Attorney at Law, dated December 12, 1979.

Exhibit AC-4 Letter from Dennis E. Valentine, Attorney at Law dated January 10, 1980.



Exhibit AC-5 Letter from the Appeals  
Council to the  
claimant's representa-  
tive, dated February  
13, 1980.

Under Section 404.957 and 404.958 of  
Regulations No. 4, it is provided that the  
decision of an administrative law judge  
which is otherwise final may be reopened  
at any time for the purpose of correcting  
error on the face of the evidence on which  
such decision was based. The administra-  
-tive law judge found that the claimant was  
entitled to a period of disability and  
disability insurance benefits commencing  
on July 21, 1975, and closing on January  
31, 1979.

In accordance with the provisions of  
section 210(a) (9) of the Social Security  
Act, as amended, service performed by an



individual as a railroad employee is excluded from the definition of employment for social security purposes. However, provisions of the Railroad Retirement Act permit such railroad employment to be considered covered employment for all social security purposes if the employee has less than 120 railroad service months. If the individual has 120 service months or more, then the railroad service can only be used for the establishment of a period of disability under the Social Security Act but not for purposes of entitlement to disability insurance benefits. See section 404.120 of Social-Security Administration Regulations No. 4 (20 CFR 404.120) and Social Security Ruling 70-20c.

The record indicates that the claimant has 254 service months; therefore, his





railroad service cannot be used for entitlement to disability insurance benefits. However, Section 404.1402 of Regulations No. 4 (20 CFR 404.1402) does permit the use of railroad service for the establishment of a period of disability.

After careful consideration of all the evidence of record, it is the decision of the Appeals Council that the claimant, based on his application filed on July 22, 1975, is entitled to a period of disability commencing on July 21, 1975, and ceasing on January 31, 1979, but not to disability insurance benefits, under sections 216(i), 223 and 210(a) (9) of the Act. The decision of the administrative law judge is herein modified.



APPEALS COUNCIL

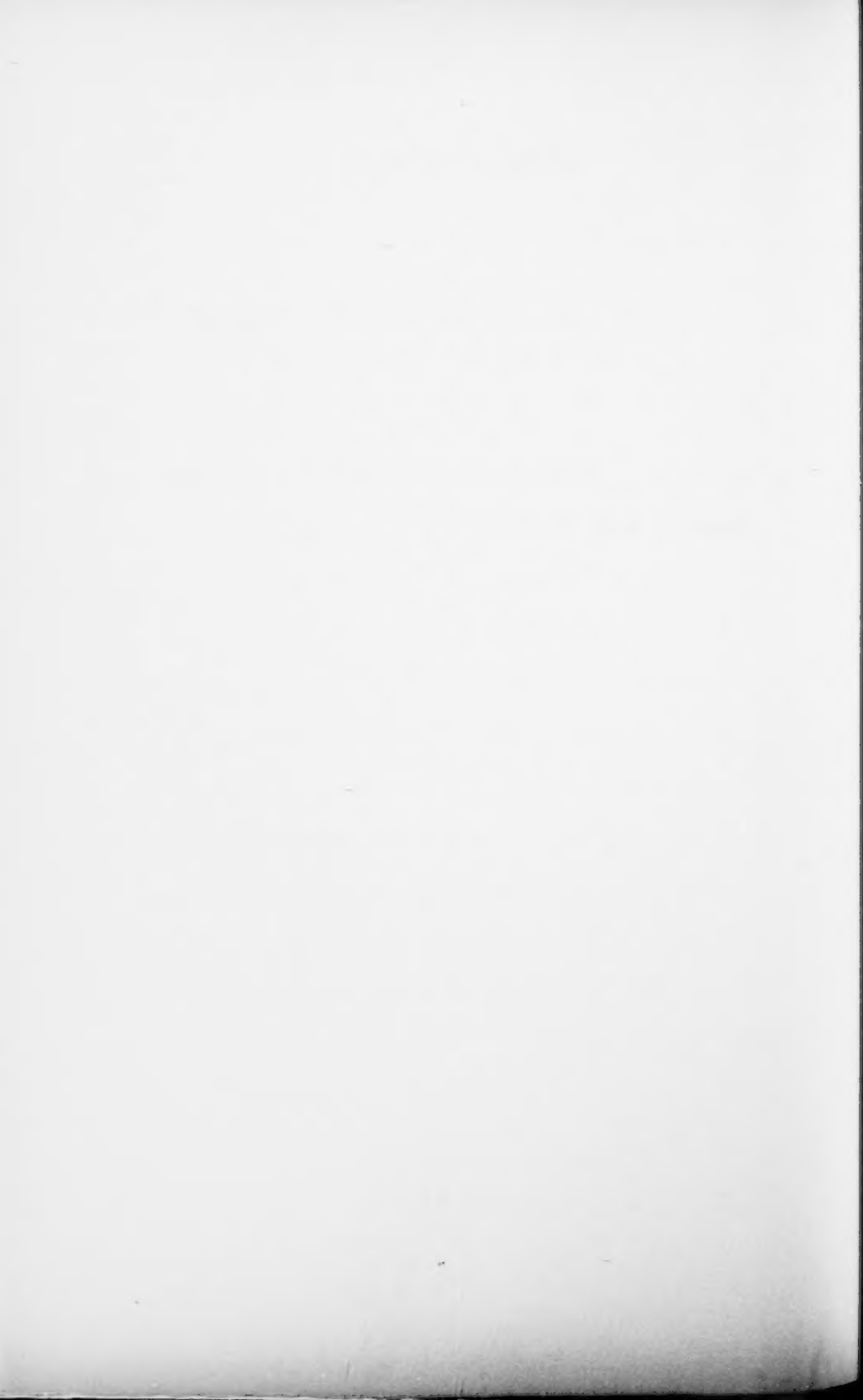
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Joseph E. Doneghy, Member

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Marshall C. Gardner, Member

Date: APR 24 1980



DENVER DISTRICT OFFICE

Rio Grande Building--6th Floor

1531 Stout Street

Denver, Colorado 80202

303/837-2771

Certified Mail No. 5433990  
RETURN RECEIPT REQUESTED

April 21, 1980

John S. Tovrea  
296 South Ogden  
Denver, Colorado 80209

Re: Charge Number 081808084

Dear Mr. Tovrea:

This refers to your recent charge and attempt to seek relief from an alleged discriminatory practice under the Age Discrimination in Employment Act against Denver and Rio Grande Railroad.

Upon receipt of your charge this office, as required by the law, (Section 7(d) of



the ADEA) made every effort to eliminate the alleged unlawful practice by informal conciliation, conferences, and persuasion. These discussions, however, did not bring about a solution acceptable to the parties. This attempt at resolution, and EEOC's taking no further action at this time, does not reflect a decision on the merits of your charge. I may suggest, however, in that medical reasons were alleged by the company at the Section 7(d) conference for failure to rehire, that you consider filing with the U.S. Department of Labor's Office of Federal Contract Compliance, the agency that enforces the Rehabilitation Act of 1973. Again, the Equal Employment Opportunity Commission can take no further action on your charge. This does not affect your individual rights (subject to the time





limitations stated above). If you have any questions, feel free to contact William J. Buckingham, ADEA-EP Unit Supervisor. You may call collect.

Sincerely yours,

WALDEN SILVA  
District Director

Enclosure:

Age Discrimination in Employment Act  
Section 6, Portal-to-Portal Act



U.S. DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION  
Office of Federal Contract  
Compliance Programs  
Room 1412, 1961 Stout Street  
Denver, Colorado 80294

DATE: June 16, 1980

APPLY TO

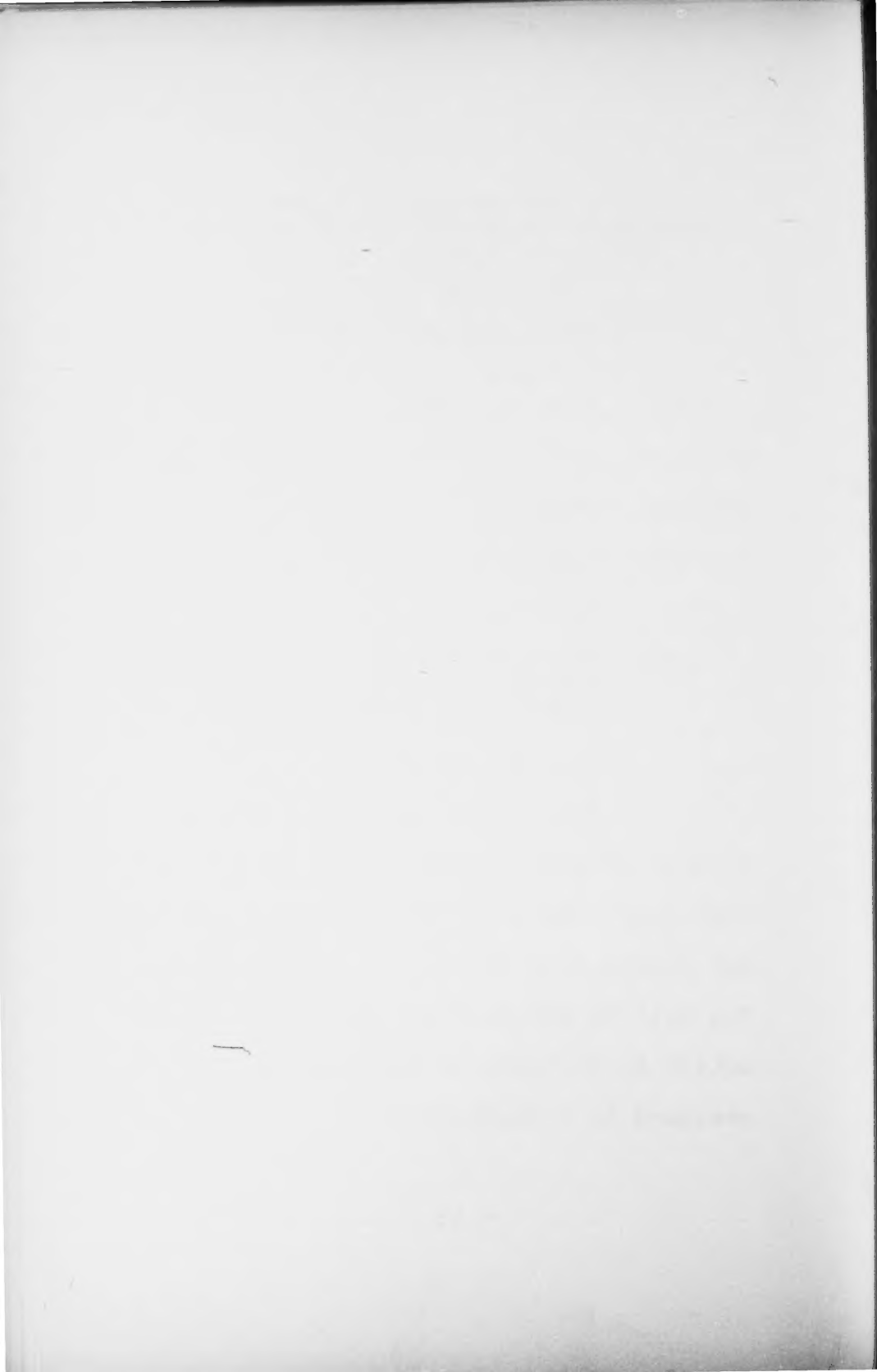
ATTN OF: OFCCP:JT

SUBJECT: Complaint Against - Rio Grande  
Railroad

TO: Mr. John Tovrea  
296 South Ogden  
Denver, CO 80202

Dear Mr. Tovrea:

This letter will acknowledge receipt of your complaint and inform you that your complaint has been referred to our Denver Area Office for investigation. You will be notified by the office of the action to be taken as soon as the case is assigned to a Specialist.



If you have any questions, you should  
contact Dennis Santistevan, Denver Area  
Office Director, at (303) 234-2154.

Sincerely,

WILLIAM D. FAUGHNAN  
Acting Assistant Regional Administrator  
Office of Federal Contract Compliance  
Programs/ESA



U.S. DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION  
Office of Federal Contract  
Compliance Programs  
WASHINGTON, D.C. 20210

Mr. John Tovrea  
296 South Ogden  
Denver, Colorado 80209

Dear Mr. Tovrea:

This Office is in receipt of your correspondence in which you appeal the decision in your complaint against Denver and Rio Grande Western Railroad.

The Office of Federal Contract Compliance Programs has requested that the Regional Office forward your case file to the National Office for an administrative review. The review will include a detailed study of the case and full consideration will be given to all facts presented.

Upon completion of the review, you will be notified of the results.





Sincerely,

JOSEPH M. HOGAN  
Acting Director, Division  
of Enforcement Coordination

Date: JUL 07 1981



Employment Standards Administration  
Office of Federal Contract  
Compliance Programs  
Washington, D.C. 20210

Department of Labor

OCT 13 1982

Mr. John Tovrea  
296 South Ogden Street  
Denver, Colorado 80209

Dear Mr. Tovrea:

This is to provide you with a status report on the administrative review of your complaint, filed under Section 503 of the Rehabilitation Act of 1973, as amended, against Denver Rio Grande Western Railroad.

In order to complete the review of your complaint, it is necessary to obtain additional information. The Denver Regional Office will contact you concerning the information.



We regret the delay in the review of your complaint. However, we feel it is necessary that we undertake a thorough and professional review of certain complex and technical medical aspects of this case. Please be assured that you will be promptly notified of the results of our review of your appeal upon its completion. Sincerely,

ELLEN M. SHONG  
Director



Employment Standards Administration  
Office of Federal Contract  
Compliance Programs  
Washington, D.C. 20210

Department of Labor

MAY 10 1983

Mr. John Tovrea  
296 South Ogden  
Denver, Colorado 80209

Dear Mr. Tovrea:

An administrative review of your case has been completed. Based on the contents and documentation in the case file, this office has determined that the weight of the evidence contained therein indicates the contractor did not take affirmative action on your behalf, thereby violating its obligations under Section 503 of the Rehabilitation Act of 1973, as amended.

In accordance with the National Office's finding, the Regional Office will contact you directly.





Sincerely,

ELLEN M. SHONG  
Director



U.S. DEPARTMENT OF LABOR  
OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS/ESA  
1961 Stout Street  
Denver, Colorado 80294

JUL 06 1983

Mr. John Tovrea  
296 South Ogden  
Denver, CO 80209

Dear Mr. Tovrea:

As you are aware, the Director of the Office of Federal Contract Compliance Programs has reviewed your appeal of the findings in your complaint against the Denver & Rio Grande Western Railroad filed under Section 503 of the Rehabilitation Act of 1973, as amended. The Director has found that the contractor violated its obligations under Section 503.

The OFCCP Denver Area Office is in the process of contacting the contractor to schedule a conciliation meeting.



You will be contacted by our Denver Area Office in the near future. If you have any questions, you may phone Mr. Dennis J. Santistevan at 837-6366.

Sincerely,

-

E. P. HELLER  
Assistant Regional Administrator  
Office of Federal Contract Compliance  
Programs/ESA, Region VIII



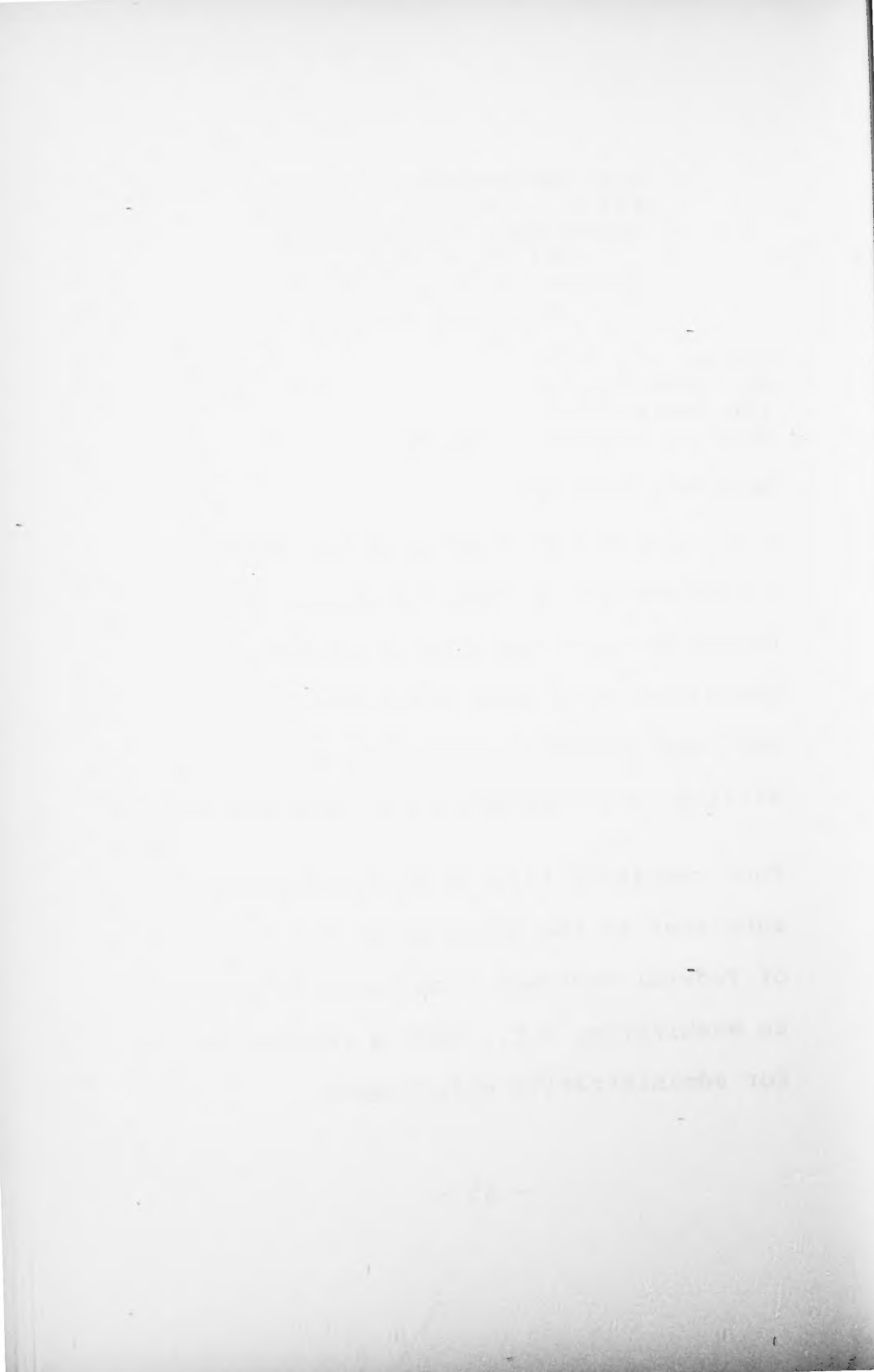
U.S. DEPARTMENT OF LABOR  
OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS/ESA  
1961 Stout Street  
Denver, Colorado 80294  
FOB Room 1412

August 10, 1983  
Mr. John Tovrea  
296 South Ogden  
Denver, Colorado 80209

Dear Mr. Tovrea:

A meeting was held on July 20, 1983, with a representative from the Denver and Rio Grande Western Railroad to discuss the conciliation of your complaint. The Railroad indicates that they are not willing to conciliate your complaint case.

Your complaint file is being prepared for submittal to the Director of the Office of Federal Contract Compliance Programs in Washington, D.C., with a recommendation for administrative enforcement.





Sincerely,

E. P. HELLER  
Assistant Regional Administrator  
Office of Federal Contract Compliance  
Programs/ESA



THE DENVER AND RIO GRANDE WESTERN  
RAILROAD COMPANY REPORT OF ALL  
PERSONAL INJURIES AND ALL VEHICULAR  
ACCIDENTS

(Report must be made in duplicate)

<p>1. Injured Person</p>	<p>Name? <u>John Tovrea</u> Age? <u>52</u> Married? <u>          </u> Nationality? <u>US</u> Street and No? <u>296 So. Ogden</u> City? <u>Denver</u> State? <u>CO</u></p>
<p>2. Relation to This Company</p>	<p>If employee, what occupation? <u>Switchman</u> Length of service? <u>25 years</u> Foreman's Name? <u>J. Adkins</u> Class or kind of work? <u>Yard</u> If passenger, from? <u>          </u> To? <u>          </u> Ticket or pass? <u>          </u> If outsider, what doing on</p>



	our property? _____
3. Place of Accident	Nearest station? _____ Track straight or curved? <u>Curved</u> Level up or down grade? _____
4. Time	Date? <u>5-22-75</u> Hour? <u>Appr 9:20/p.m.</u> Daylight or dark? <u>dark</u>
5. Weather	Clear? _____ Foggy? _____ Raining? <u>X</u> Snowing? _____ Windy? _____
6. Injury	Describe injuries <u>twisted</u> <u>back, bruised right leg, head</u> _____ Length of Disability? _____ _____
7. Surgeon	Name and address of doctor? _____ Hospital? _____



8. Details | Explain fully how accident  
of | occurred: Shoved 32 cars,  
Accident | high from 7th St. Yd to Q  
| transfer, received stop  
| sign, then cut off sign,  
| climbed off car. While  
| uncoupling, Q engine pulled  
| cut, twisted back getting  
| one ft board

(If necessary, use back of  
sheet to complete)

9. Cause | What does injured person say  
or | was cause of accident?  
Blame | Q eng pulled before R.G. cut  
| off

Does injured person blame  
anyone or anything?

Who or what? \_\_\_\_\_

Did you see accident? \_\_\_\_\_





How far away were you? \_\_\_\_\_

In your opinion what was  
cause of accident? \_\_\_\_\_

10. Defects

Any defect? Yes

If so, describe fully: No  
handle on eng. pin lifter  
valve

If any defect, how long had  
it existed? \_\_\_\_\_

Did injured party know of  
defect before accident? Yes

Did anything break or give  
way? \_\_\_\_\_

If so what? \_\_\_\_\_

Date and hour of your inspec-  
tion of tools, machines, etc.  
involved in accident? \_\_\_\_\_



	Anything defective at that time? _____
11. Eyes	Was injured person wearing goggles? _____ If not, why not? _____
12. Train	Train No. - <u>1</u> Direction? <u>N. West</u> Number of Cars? <u>32 cars</u> Loads? _____ Conductor? <u>J. Adkins</u> Head Brakeman? <u>J. Tovrea</u> Rear Brakeman? <u>G. Woods</u> Train Engine No. <u>146</u> Engineer? <u>K. Barlow</u> Fireman? _____ Helper Engine No. _____ Engineer? _____ Fireman? _____ Speed? <u>0</u> Whistle sounded? _____



	Engine bell ringing? _____
	Headlight burning? _____
	WAS ENGINE: Backing? _____
	Moving forward? _____
	Standing? <input checked="" type="checkbox"/> _____
	Were cars being pulled? _____
	Shoved? <input checked="" type="checkbox"/> _____ Kicked? _____
	Who was protecting movement? _____
	How? _____
13. Car(s)	If car or cars involved, give initials and numbers? _____ _____
	Condition hand-holds, grab- irons, couplers, brakes, etc.? _____
14. Witnesses	Names, addresses, occupations, of all WITNESSES: <u>Kelly</u> <u>Barlow - Engineer</u> _____



If Vehicular Accident, Also

Answer the Following Questions:

A. Vehicle	Make and type _____ Year of manufacture? _____ License No.? _____ Windows, open or closed? _____ Radio? _____ Turned on? _____ Extent of damage _____ _____
B. Owner	Owner's name and address? _____
C. Driver	Driver's name, age and address? _____ Injuries? _____
D. Others in Vehicle	Name? _____ Age? _____ Address? _____ Injuries? _____ Name? _____





Age? \_\_\_\_\_

Address? \_\_\_\_\_

Injuries? \_\_\_\_\_

Name? \_\_\_\_\_

Age? \_\_\_\_\_

Address? \_\_\_\_\_

Injuries? \_\_\_\_\_

Name? \_\_\_\_\_

Age? \_\_\_\_\_

Address? \_\_\_\_\_

Injuries? \_\_\_\_\_

E. Speed

How far was auto from  
crossing when first seen by  
you? \_\_\_\_\_

How far was front end of  
train from crossing when auto  
first seen by you? \_\_\_\_\_

Speed of auto at that  
time? \_\_\_\_\_

Speed of train then? \_\_\_\_\_



	<p>Speed of auto at moment of accident? _____</p> <p>Speed of train then? _____</p> <p>Did auto approach from engineer's or fireman's side? _____</p> <p>How far did train run after accident? _____</p>
<p>F. Crossing</p>	<p>Public or private crossing? _____</p> <p>Was view obstructed? _____</p> <p>If obstructed, by what? _____</p> <p>Any Crossing Watchman? _____</p> <p>If so, was he properly protecting Crossing? _____</p> <p>How? _____</p> <p>Any Wig-wag (or) Crossing Gong? _____</p> <p>Operating OK? _____</p>



Dated: 5-23-73 3922 Report of:

(Sign here): John Tovrea

Occupation: Switchman

Address: Street, No. and City: \_\_\_\_\_

\_\_\_\_\_  
(The person below will always know my address):

Name: Mary Ann Tovrea

Address: 296 So. Ogden

Denver, CO 80209

Witness to Signature:

Mary Ann Tovrea

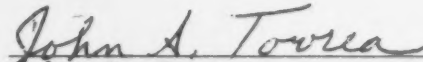
Address: 296 So. Ogden St.

Denver, CO 80209



Petitioner John S. Tovrea, under oath,  
states that former attorney did not inform  
him of any agreement with attorney for the  
Board that he would not present other  
issues before the Boards.

10-3-89

  
\_\_\_\_\_  
John S. Tovrea  
296 So. Ogden  
Denver, CO 80209

October 3, 1989

- Cynthia M. Swanson  
My Commission Expires  
May 15, 1990





CERTIFICATE OF SERVICE

I hereby certify that I have today sent three copies each of the petition for a Writ of Certiorari to respondent's attorneys by mailing such copies by U.S. Mail--1st Class--to these attorneys on October 1989:

Steven A. Bartholow  
Deputy Grand Council  
National Retirement Board of Counsel  
844 Rush St.  
Chicago IL 80611

Edward S. Heintzke  
Asst. General Counsel  
National Retirement Board of Counsel  
844 Rush St.  
Chicago, IL 60611

Karl T. Blank  
General Attorney  
National Retirement Board of Counsel  
844 Rush St.  
Chicago, IL 60611

Dated October 3, 1989

John S. Tovrea  
296 So. Ogden St.  
Denver, CO 80209  
(303) 733-1652